

83-1989

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

KEVIN WAYNE SULLIVAN,
Petitioner,

v.

THE GEORGIA DEPARTMENT OF
NATURAL RESOURCES AND THE
RESEARCH VESSEL "ANNA",
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION BY THE RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals for the Eleventh Circuit properly concluded that the State of Georgia did not constructively waive its Eleventh Amendment immunity by operating a research vessel in the navigable waters of the United States.

TABLE OF CONTENTS

	<u>Page (s)</u>
QUESTION PRESENTED.	i
REASONS FOR DENYING THE WRIT. .	2
A. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY HELD THAT OPERATION BY THE STATE OF GEORGIA OF A RESEARCH VESSEL IN THE NAVIGABLE WATERS OF THE UNITED STATES DID NOT CONSTITUTE A CONSTRUCTIVE WAIVER OF ELEVENTH AMENDMENT IMMUNITY TO SUIT UNDER THE JONES ACT, 46 U.S.C. § 628.	2
B. THE PETITIONER HAS NOT DEMONSTRATED A CONFLICT AMONG THE CIRCUITS OR ANY OTHER SPECIAL REASON WHY THE WRIT SHOULD BE GRANTED.	8



TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>Cases cited:</u>	
<u>Chesapeake Bay Bridge & Tunnel</u> <u>District v. Lauritzen</u> , 404 F.2d 1001 (4th Cir. 1968).	11
<u>Edelman v. Jordan</u> , 411 U.S. 651, 662-63 (1974).	3
<u>Employees of the Dept. of</u> <u>Public Health & Welfare v.</u> <u>Dept. of Public Health &</u> <u>Welfare</u> , 411 U.S. 279 (1973). .	5,7,8
<u>Faust v. S.C. State Hwy.</u> <u>Dept.</u> , 721 F.2d 934 (4th Cir. 1983), ____ U.S. ____, 52 U.S.L.W. 3872 (June 5, 1984). .	11
<u>Hans v. Louisiana</u> , 134 U.S. 1 (1890).	3
<u>Intracoastal Transportation,</u> <u>Inc. v. Decatur County, GA,</u> 482 F.2d 361 (5th Cir. 1973). .	6
<u>Parden v. Terminal Railway of</u> <u>the Alabama State Docks Dept.,</u> 377 U.S. 184 (1964)	4,5,7
<u>Petty v. Tennessee-Missouri</u> <u>Bridge Commission</u> , 359 U.S. 275 (1959).	4,8,9,10
 <u>STATUTES CITED:</u>	
<u>Federal Employers' Liability</u> <u>Act</u> , 45 U.S.C. §§ 51-60	5

TABLE OF AUTHORITIES (con't)

Jones Act, 46 U.S.C. § 688. . . . 2, 7



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OCTOBER TERM, 1984

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THE GEORGIA DEPARTMENT OF NATURAL
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PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF IN OPPOSITION BY THE RESPONDENT

The Respondents, the Georgia Department of Natural Resources and the Research Vessel "ANNA," urge the Supreme Court to deny the petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above

case on February 13, 1984.

The decision of the Court of Appeals was clearly correct, and the Petitioner has shown no conflict among the Courts of Appeals, conflict with applicable decisions of this Court or other special reason for granting the writ.

REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEALS

CORRECTLY HELD THAT OPERATION BY THE STATE OF GEORGIA OF A RESEARCH VESSEL IN THE NAVIGABLE WATERS OF THE UNITED STATES DID NOT CONSTITUTE A CONSTRUCTIVE WAIVER OF ELEVENTH AMENDMENT IMMUNITY TO SUIT UNDER THE JONES ACT, 46 U.S.C. § 688.

The Eleventh Circuit Opinion holds, and the Petitioner does not seriously

contest, that the action against the Georgia Department of Natural Resources and the R/V "ANNA" is barred by the Eleventh Amendment, unless the State has waived its constitutional immunity. The Eleventh Amendment to the United States Constitution provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."

It is well settled that the Eleventh Amendment also bars suits brought against a State by its own citizens. See Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Hans v. Louisiana,

134 U.S. 1 (1890). Based on the decisions of this Court, properly construed, and based on the facts presented by this case, the Court of Appeals held that there has been no waiver of this immunity.

The Petitioner does not contend that there has been any express waiver of immunity on the part of the State, thus rendering Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) inapposite to this case. Here, the only question is whether there was any implied or constructive waiver of Eleventh Amendment immunity under the facts of this case.

In determining whether there had been a constructive waiver of immunity, the Court of Appeals examined the decisions of this Court in Parden v.

Terminal Rwy. of the Alabama State Docks Dept., 377 U.S. 184 (1964), and Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279 (1973).

In Parden, the Court held that Alabama had constructively waived its immunity from suit pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, when it began operation of a railroad for profit in interstate commerce. The broad language in Parden was construed and limited to the facts in that case by the Court's decision in Employees, in which it rejected the claims of State employees that the State had constructively waived its immunity from suit under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19. In Employees,

it was made clear that the Court will not find abrogation of the Eleventh Amendment by federal statute unless Congress has specifically stated its purpose to exercise its powers under the Commerce Clause to make the States subject to suit in federal court. Despite the fact that the statute was clearly extended to cover State employees, the Court refused to hold, in the absence of a clear statement of Congressional purpose to abrogate the Eleventh Amendment, that the States were subject to suit by its citizens or citizens of other States to enforce the provisions of the federal statute. Where Congress intends that the States should be subject to suit by individual citizens, it must specifically so state.

The Eleventh Circuit correctly held, as had the Fifth Circuit in Intracoastal

Transportation, Inc. v. Decatur Co., Ga.,
482 F.2d 361 (5th Cir. 1973), that the
holding in Parden was limited by the
Court's decision in Employees.

Further, even assuming continued
vitality to the Parden decision, the case
at bar deals not with a profit-making
venture operating like an ordinary common
carrier (377 U.S. at 184), but with a re-
search vessel operated in connection with
the State's fish and shrimp assessment
programs.

The Jones Act contains no language
indicating any intention on the part of
Congress to abrogate the Eleventh Amend-
ment immunity of the States. There is
no evidence of an express waiver on the
part of the State of Georgia. And the
limited circumstances which were con-
strued in Parden to constitute a con-
structive waiver of immunity simply are

not present in this case. As a result, the result is clear. As the Eleventh Circuit held, the case is controlled by Employees and the suit is barred by the Eleventh Amendment.

B. THE PETITIONER HAS NOT
DEMONSTRATED A CONFLICT
AMONG THE CIRCUITS OR ANY
OTHER SPECIAL REASON WHY
THE WRIT SHOULD BE GRANTED.

As set forth above, the decision of the Eleventh Circuit is not inconsistent with the applicable decisions of this Court. While the Petitioner argues that the decision is inconsistent with Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959), it is clear that that decision is not controlling.

In Petty, the Court did not hold that Congress had exercised its powers

under the Commerce Clause to make the Jones Act remedies available against the States; Petty simply held that in that fact situation the Eleventh Amendment immunity had been waived. In Petty suit was brought pursuant to the Jones Act against a bi-state corporation established by Tennessee and Missouri by means of an inter-state compact which was entered into with the express approval of Congress. The Court first noted that the States have immunity pursuant to the Eleventh Amendment and that the conclusion that there has been a waiver of immunity will not be lightly inferred. 359 U.S. at 276. The Court also noted that suits based on maritime torts are no exception to the Eleventh Amendment. 359 U.S. at 275.

However, the Court held that the compact which included a clause

authorizing the bi-state corporation to sue and be sued constituted an express waiver of immunity from suit. 359 U.S. at 280.

The decision in Petty is thus merely an evaluation of statutory language as to whether or not it constituted a waiver of immunity. By implication, the cause of action in Petty would have been barred by the Eleventh Amendment but for the waiver of immunity. Rather than supporting the Petitioner's position, Petty bolsters the Eleventh Circuit's conclusion that a suit against a State pursuant to the Jones Act is barred unless there has been a waiver of immunity.

The Petition does not advance any special reason justifying a writ of certiorari, as set forth in Rule 17 of the

Rules of the Supreme Court. The Petitioner can point to no disagreement between the circuits on this issue. In fact, the Fourth Circuit recently overruled an earlier decision finding constructive waiver of Eleventh Amendment immunity in an admiralty tort, Chesapeake Bay Bridge & Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968), and held that operation of a ferry on navigable waters did not constitute a constructive waiver of Eleventh Amendment immunity. Faust v. S.C. State Hwy. Dept., 721 F.2d 934 (4th Cir. 1983). This Court recently denied certiorari in that case. ____ U.S. ____, 52 U.S.L.W. 3872 (June 5, 1984).

In sum, the Petitioner has shown no reason which would justify this Court's grant of the Petition for a Writ of Certiorari. The decision of the Court

of Appeals is correct and is consistent with the applicable decisions of this Court and decisions of the other circuits. The Respondents urge the Court to deny the Petition.

Respectfully submitted,

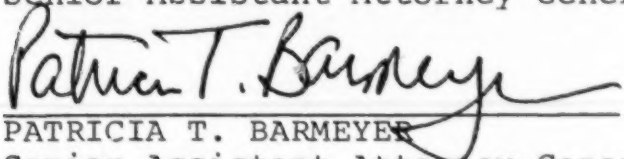
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CERTIFICATE OF SERVICE AND MAILING

I, PATRICIA T. BARMEYER, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondents, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition by the Respondents upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage to:

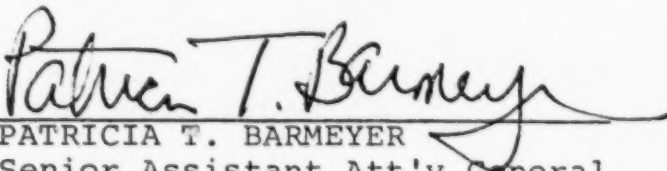
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I further certify and affirm that in accordance with the rules of the Supreme Court of the United States, I

have this day mailed forty (40) copies of
this Brief in Opposition by the Respon-
dents to the Clerk of the U. S. Supreme
Court with proper address and adequate
postage, as follows:

Clerk, U. S. Supreme Court
1 First Street, N. E.
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This 5th day of July, 1984.


PATRICIA T. BARMAYER
Senior Assistant Att'y General

Sworn to and subscribed
before me this 5th day
of July, 1984.


NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

Notary Public, Georgia State at Large
My Commission Expires Nov. 29, 1986